QUESTIONS PRESENTED

1. Whether, in a trial for concealing unlawfully-imported marihuana, it was error to charge that the jury could properly infer unlawful importation of marihuana if satisfied that the evidence showed petitioners were in possession of marihuana in Arizona.

2. Whether the sentence of five years' imprisonment constituted cruel and unusual punishment.

STATEMENT

After a jury trial in the United States District Court for the District of Arizona, petitioners were convicted of receiving, concealing and facilitating the transportation of forty-eight bricks of marihuana, knowing that they had been unlawfully imported into the United States, in violation of 21 U.S.C. 176a. On June 23, 1969, each was sentenced to imprisonment for five years. The court of appeals affirmed.

The evidence showed that at approximately 5:30 p.m. on February 23, 1969, petitioners drove a 1955 Buick station wagon across the Mexican border into the United States at Nogales, Arizona. A customs search at the border uncovered no contraband. However, the searching agent recognized the distinct odor of marihuana in the vehicle (III Tr. 19–29).[1]

Shortly before 8 p.m. that same evening petitioners were spotted by two immigration inspectors heading north from Nogales on Route 89 in the same vehicle.

[1] A separately paginated three-volume record has been filed with the Clerk of this Court. Volume II contains the transcript of a hearing on a motion to suppress evidence. Volume III contains the transcript of trial.

Because of the darkness, the inspectors were able to catch only a glimpse of the driver, petitioner Avey. They noticed that he had a mustache and wore a Stetson hat, giving the appearance of being of Mexican extraction (III Tr. 31–32). Believing that petitioners might be engaged in smuggling aliens in the back of the station wagon, the agents decided to make a spot check of the vehicle (II Tr. 5–6, 34; III Tr. 31–32, 50–51). They flagged down petitioners' car. Petitioner Avey left the station wagon and walked over to Inspector Whitaker to ascertain why he had been stopped. While Whitaker inquired of Avey's citizenship, Inspector Mathyer shined his flashlight into the rear of the station wagon. He saw a tarpaulin, under which brick-shaped packages had been placed in a haphazard manner, causing the tarpaulin to bulge and partially expose several packages wrapped in a red cellophane material (III Tr. 53). Because of their prior experience with similarly wrapped packages of that size, the inspectors strongly believed that they contained marihuana (II Tr. 4–5; III Tr. 34, 53). Petitioner Dean was then ordered out of the station wagon and both petitioners were frisked and handcuffed; a customs agent was summoned. Agent Holgerson arrived within a half-hour. He removed one of the packages from the station wagon and verified that its contents were marihuana (III Tr. 57). A search of the station wagon later that evening, after it had been impounded, uncovered 48 bricks of marihuana, weighing approximately 80 pounds (III Tr. 62–63, Pros. Exh. 1–48). The customs

agent estimated the value of marihuana in the United States at $100 per pound (III Tr. 104–105).

ARGUMENT

1. In its closing charge, the trial court instructed that, if the jury found beyond a reasonable doubt that the packages taken from the station wagon contained marihuana seized within the State of Arizona, it could properly infer that the marihuana had *in fact* been imported contrary to law (Pet. 8, Pet. App. iv–v). As to *knowledge of* illegal importation—the aspect of the statutory presumption struck down in *Leary* v. *United States*, 395 U.S. 6[2]—the court unassailably charged that such *knowledge* had to be separately found as a distinct element of the offense. Petitioners object to the inference of illegal importation, based on the presence of the marihuana in Arizona under the circumstances of this case, on two grounds: (1) they contend such an inference cannot constitutionally be made because it deprives the defendant of certain safeguards, such as freedom from compulsory self-incrimination and the presumption of innocence; (2) they claim that unlawful importation cannot rationally be inferred from the simple fact that the marihuana was present in Arizona in this case.

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[2] 21 U.S.C. 176a provides in pertinent part:

> Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

In *Leary*, after noting the two elements of the presumption, this Court did not reach the question of the validity of the importation inference. 395 U.S. at 37.

a. The first argument amounts to an attack upon all legislatively created presumptions in the criminal law. See *Turner* v. *United States*, 396 U.S. 398, 429–434 (dissenting opinion of Mr. Justice Black). This Court, however, has consistently upheld the validity of statutory presumptions when there exists a rational connection between the fact proved and the ultimate fact to be presumed. See, *e.g.*, *Tot* v. *United States*, 319 U.S. 463; *United States* v. *Gainey*, 380 U.S. 63; *United States* v. *Romano*, 382 U.S. 136. As recognized in *Yee Hem* v. *United States*, 268 U.S. 178, 185:

> The point that the practical effect of the statute creating the presumption is to compel the accused person to be a witness against himself may be put aside with slight discussion. The statute compels nothing. It does no more than to make possession of the prohibited article *prima facie* evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case. The same situation might present itself if there were no statutory presumption and a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution.

Here, the court in its closing charge did state that defendants were innocent until proven guilty and that the burden of proving guilt was upon the government. The instruction that possession of marihuana authorized the jury to infer, if it so desired, that the marihuana was unlawfully imported, did not nullify the effect of the other instructions, particularly since the court at the same time carefully informed the jury that "there is a possible contrary inference which you might draw; that is, that the marihuana was not imported contrary to law" (Pet. App. ix).

b. On petitioner's second point, the court of appeals accurately observed that the rationality of the inference of importation has been uniformly upheld (Pet. App. xii–ix). Moreover, it finds strong support in recent statistics showing that, while sizeable quantities of domestically grown marihuana have been seized by federal officials (cf. *Leary* v. *United States*, 395 U.S. 6, 43 n. 90), the vast preponderance of confiscated marihuana is of foreign origin (Pet. App. x–xi). This is particularly true of marihuana seized in States bordering Mexico. See *United States* v. *Adams*, 293 F. Supp. 776, 782 n. 12 (S.D.N.Y.). The statutory presumption of unlawful importation from proof of possession in these circumstances, does no more than "accord to the evidence, if unexplained, its natural probative force." *United States* v. *Gainey*, 380 U.S. at 71.

Here petitioners when first sighted were but twelve miles from the Mexican border (Tr. 31–32), traveling north in a station wagon which had crossed the border

only two hours before, and which then carried the smell of marihuana, although none could be found at the time of the border search. To allow the jury to infer from proof of possession of a large quantity of distinctly packaged marihuana at that time and place that the marihuana was imported contrary to customs law simply accords the circumstantial evidence in this case a common sense interpretation. Thus, the propriety of the inference in this case was justifiable apart from the statute, and does not depend upon a demonstration that the importation inference would be valid in all situations.

2. Petitioners' contention, that the imposition of a mandatory minimum prison sentence of five years, with no possibility of suspension or probation, constitutes cruel and unusual punishment, has been consistently rejected by the courts. *United States* v. *Drotar*, 416 F. 2d 914 (C.A. 5), certiorari pending, No. 5111, this Term; *Bettis* v. *United States*, 408 F. 2d 563 (C.A. 9); *United States* v. *Ward*, 387 F. 2d 843 (C.A. 7). Whether or not desirable as a matter of legislative policy, mandatory minimum sentences are far from unusual in this country's penal systems. See *United States* v. *Chow*, 398 F. 2d 596 (C.A. 2). The sentence to five years' imprison-

[3] While the court's instruction referred to possession in the "State of Arizona", rather than in the specific location within the state disclosed by the evidence, no request was made for an instruction more geographically limited. All of the evidence established the location of petitioners' possession of marihuana at Milepost 13. There is, accordingly, no possibility that petitioners' convictions could have been founded on possession somewhere in Arizona farther from the border.

ment for concealing and facilitating the transportation of 80 pounds of marihuana unlawfully imported into the United States is not so far out of proportion that it shocks a balanced sense of justice and therefore constitutes a violation of the Eighth Amendment. *Halpin* v. *United States*, 295 F. 2d 458 (C.A. 9). This is so even in light of the present public attention given to marihuana and the recognized need for further research on its harmful effects. Absent conclusive scientific evidence tending to undermine the legislative conclusion that conduct such as that by petitioners presents a danger to society warranting the type of punishment imposed, the five-year mandatory sentence cannot be considered unconstitutional. See *Powell* v. *Texas*, 392 U.S. 514, 531–537.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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